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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALFRED JOHN BELL, Defendant and Appellant.	E049425 (Super.Ct.No. SWF027309) **OPINION**

APPEAL from the Superior Court of Riverside County. Carl E. Davis, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

James A. Skidmore II for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Alfred John Bell guilty of assault (Pen. Code, § 240), the lesser included offense of assault with intent to commit rape (Pen.

Code, § 220) (count 1); burglary (Pen. Code, § 459) (count 2); and indecent exposure (Pen. Code, § 314, subd. (1)) (count 4).[1] As a result, he was sentenced to a total term of four years in state prison. On appeal, defendant contends (1) the trial court erred in admitting evidence of his prior sexual misconduct; (2) there was insufficient evidence to sustain his conviction for burglary; and (3) he should have received probation or a mitigated term. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND

From January 2007 to June 2007, Jane Doe worked for an answering service in Temecula. Her duties included answering the telephones for about 100 doctors, lawyers, and accountants. Her job also entailed dispatching for a towing company that was located on the same property as the answering service. She met defendant when he and his father were in the process of buying the answering service and the towing company. During that time, defendant asked Jane out to dinner several times and made comments about her breasts and how he wanted to see them. Jane told defendant that he was too young for her and reminded him that he was married and had a family. Jane never had a personal or sexual relationship with defendant, and she never gave defendant her telephone number.

[1] Prior to trial, the court granted the People's motion to dismiss count 3, false imprisonment (Pen. Code, § 236).

On June 20, 2007, Jane went to jail in Los Angeles County for a theft-related incident. She was released on February 1, 2008. Upon her release, she and her daughter secured an apartment together in Temecula. Approximately one month prior to Jane's arrest, Jane's daughter began working at the answering service. Jane tried to get her job back at the answering service but was denied employment due to the felony conviction.

Jane occasionally went to the answering service to drop off lunch for her daughter. While Jane was there, defendant made sexual remarks to her and asked her to dinner or lunch. Jane always rejected defendant and told him "no."

On one occasion in early July 2008, after Jane had dropped off lunch to her daughter and as she was opening the door to her vehicle, defendant came up behind her, grabbed her, and hugged her. She pushed him and told him to let go.

Jane thereafter went home. Due to the heat, she propped open the front door so the breeze could get in. At some point, she fell asleep on the couch and was awakened by defendant squatting next to her, touching her arm. Jane was startled and scared. She immediately got off the couch and asked defendant what he was doing there. Defendant replied that he had come to ask her out to dinner. Defendant had never been to her apartment before, and Jane had not given him permission to enter her residence.

After asking Jane out to dinner, defendant grabbed her and began hugging her. Jane pushed him and was able to "wriggle[] away from him." Defendant kept asking her when she was going to show him her breasts. Jane told defendant several times to leave. When she took a step toward the front door, defendant asked her if he could use the

bathroom. Jane said no and again told defendant to leave. Defendant, however, walked into the bathroom. Jane stood in the doorway to the balcony, smoking a cigarette and keeping her eye on the bathroom. She noticed that the bathroom door was not shut all the way and the light was not on, so she was unsure whether defendant was still in it. She yelled to defendant but received no answer.

Defendant then rapidly advanced towards Jane from the bathroom with his jeans unzipped and his penis in his hand. Jane became really scared at that point, because she did not know if he was going to rape her. Jane yelled at defendant to get out of her apartment. Defendant grabbed Jane, held her, and rubbed his penis against her abdomen, while asking her to see her breasts. Jane was able to get free and walked toward the front door. Defendant followed Jane, walking past her and out the front door. As Jane slammed and locked her door, she heard defendant say, "I guess we're not going to dinner."

Jane did not immediately call the police. She was afraid defendant would come back, but she did not think anyone would believe her due to her criminal record. She was also worried that her daughter, who was pregnant and needed to keep her employment, would lose her job.

Several days later, Jane told her daughter about the incident. Her daughter encouraged her to report the incident to the police. Shortly thereafter, Riverside County Sheriff's Detective Carlos Topete interviewed Jane and took a report.

Detective Topete then interviewed defendant. Defendant initially denied any wrongdoing. He eventually admitted entering Jane's apartment while she was asleep but claimed he did so to pay her for lunch, which she had bought for him earlier in the day.[2] Defendant also admitted hugging her and exposing his penis to her, hoping she would expose her breasts to him.

D.H. and M.L. were victims in defendant's prior sexual offenses. D. testified that in 1998, when she was 13 years old, defendant had exposed his penis to her while she was walking to a bus stop to go to school. Specifically, defendant had pulled his truck alongside D. with the window down and asked D. her name. She walked up to the window and noticed that defendant had his zipper down with his penis out, and he was masturbating. When D. asked defendant what he was doing, he replied he was trying to "get some."

M. testified that in 1998, when she was 16 years old, defendant exposed his penis to her. Specifically, while she was sitting at a bus stop, defendant drove by twice and then parked his car in a parking lot near the bus station facing the street. M. asked defendant if he had a cigarette. Defendant replied, "I got a cigarette. Come here." When she walked over to defendant, approaching him from the driver's side, she saw that defendant was masturbating. His penis was erect and out of his pants.

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[2] Jane testified that defendant had not asked her to bring him any lunch or given her money.

Defendant's defense was that he did not commit the charged offenses, and he presented alibi witnesses who offered a timeline for defendant's activities on the day of the incident, July 2, 2008. Defendant's wife testified that she was with defendant on the day of the incident. Other witnesses also testified that they were with defendant on July 2. Defendant's father testified that Jane had applied for unemployment benefits while she was in jail and that he had opposed the benefits because she was a felon convicted of running a "chop shop."

II

DISCUSSION

A. *Admission of Prior Sex Offenses*

Defendant argues that the trial court prejudicially erred when it admitted evidence of his prior sexual misconduct involving D. and M.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) Evidence of a defendant's conduct is generally not admissible to show disposition or propensity but is admissible to prove identity, plan, intent, knowledge, or opportunity. (Evid. Code, § 1101.)[3] Section 1108 is a statutory exception, which allows propensity evidence to be admitted in sex offense cases to show a defendant is more likely to have committed the charged offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).)

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[3] All future statutory references are to the Evidence Code unless otherwise stated.

"[S]ection 1108 was intended in sex offense cases to relax the evidentiary restraints [of] section 1101, subdivision (a) . . . to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.) As stated by our Supreme Court in *Falsetta*, "the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. [Citation.]" (*Id*. at p. 915.)

Under section 1108, uncharged sexual misconduct is admissible subject to section 352.[4] (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1315.) Section 352 is a safeguard against the possible undue prejudice that can arise from the admission of evidence of uncharged sexual misconduct. It requires the trial court to engage in a weighing process by considering several factors to determine whether the probative value of the evidence outweighs its prejudicial effect. These factors include the nature of the act; its relevance and reliability; possible remoteness; the likelihood of confusing,

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[4] Under section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

misleading, or distracting jurors; its similarity to the charged offense; the burden on the defendant in defending against the uncharged acts; and the availability of less prejudicial alternatives. (*Falsetta*, *supra*, 21 Cal.4th at pp. 916-917.)

"""The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'""" (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) When evidence of uncharged misconduct is no stronger and no more inflammatory than evidence presented on the charged offense, the potential for prejudice is decreased because these circumstances make it unlikely a jury's passions would be inflamed by the uncharged misconduct. (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1276-1277.) In addition, the probative value of uncharged misconduct is greater if it is wholly independent of the evidence of the charged offense. (*Id*. at p. 1276.)

Prior to trial, the People filed a motion in limine seeking to admit testimony about two prior instances of sexual misconduct by defendant that occurred in 1998 and involved defendant exposing his penis to the victims, as in this case. The People sought admission of this evidence under sections 1101 and 1108 to show defendant's intent or that he had a propensity to commit sex offenses. In opposition, defense counsel argued this evidence was too prejudicial.

The trial court granted the People's motion and explained, "I . . . think that the probative value of the evidence of this kind in a case where sexual trespass is a peculiar-

type crime and carries strong sexual impulsive behavior and motive, and has a lot of psychological features to it, and the other sex acts are not completely dissimilar to this situation. There was an element of exhibitionism involved in this case, where I learned from the brief, and where you've got a one-on-one situation, I think it's highly probative to the People's case to bring out his propensity for sexual trespass. . . . I think that probative value outweighs any prejudicial effect. Because I will give the limiting instruction that they are to use [it] cautiously and not let that, alone, sway their decision . . . ."

In our view, the trial court's admission of the two prior acts of sexual misconduct was not unduly prejudicial to defendant. The defense theory of the case was that defendant did not commit the crimes, arguing that the victim was not believable and had a motive to lie. Clearly, the jury was called upon to decide a credibility contest between defendant and Jane. Jane was the only witness to the offenses against her. As such, her credibility was a key issue in the case. Therefore, evidence of defendant's prior sexual misconduct of a similar nature was not only relevant but also highly probative of the credibility of the victim of the charged offense. Because the probative value of the prior sexual misconduct evidence was particularly high on the issue of credibility, it weighed heavily in favor of admission. It was also relevant to establish that defendant was predisposed to making unwanted sexual advances to unwilling victims.

Other factors also weighed in favor of admitting the testimony about defendant's prior sexual misconduct. The testimony of D. and M. about the prior incidents were not

particularly time consuming, remote, or inflammatory in comparison to the charged offenses. Nor is there anything to even suggest the jury might have been confused by the issues or that it convicted defendant of the current offenses based on his past sexual misconduct. It has been held that "the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses . . . ." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) However, it is also reduced somewhat if, as here, the jury simply is not told whether or not the prior offense resulted in a conviction.[5] (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [Fourth Dist., Div. Two].)

Defendant contends the dissimilar nature of the prior offenses and his lack of a relationship with the victims of those offenses made them have little probative value, and any such value was outweighed by their prejudicial effect. "The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) Here, there were similarities. All three offenses involved defendant exposing his penis to the victims. The offenses also involved defendant's unwanted advances to women who clearly did not have an interest in him.

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[5] Here, defendant's prior offenses resulted in convictions; however, the jury was not informed of this fact.

Defendant suggests that the prior sexual offenses were too remote. However, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) "[T]he passage of a substantial length of time does not automatically render the prior incidents prejudicial," especially when probative of a defendant's sexual misconduct. (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.) It is only one factor in the weighing process. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 739.)

Moreover, even if the trial court erred by admitting the prior offenses, it is not reasonably probable that the jury would have acquitted defendant had the prior offenses been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Harris*, *supra*, 60 Cal.App.4th at p. 741.)

Here, defendant admitted that he had entered Jane's apartment while she was asleep. He also admitted exposing his penis to her and hugging her. In addition, the jury was given appropriate limiting instructions on the use of the prior acts evidence to prevent any potential prejudice. We presume the jury followed these instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217; *People v. Hollie, supra*, 180 Cal.App.4th at p. 1277.)

Defendant argues that the prior sexual misconduct evidence was prejudicial because Detective Topete violated the court's instruction by stating defendant was a registered sex offender. However, as suggested by defense counsel, the trial court remedied the situation by striking the detective's statement and admonishing the jury to

"not consider it for any purpose." Again, we presume the jury followed these instructions. (*People v. Gray*, *supra*, 37 Cal.4th at p. 217.) Indeed, it appears the jury was not prejudiced by the detective's comment or the prior sexual acts evidence, as the jury found defendant guilty of the lesser offense of assault rather than assault with the intent to commit rape.

Based on the foregoing, even had the trial court excluded the testimony of D. and M., the result of the trial would have been the same.

B. *Sufficiency of the Evidence*

Defendant next argues there was insufficient evidence to support the burglary conviction, because there was no evidence to show that he had entered Jane's apartment with the specific intent to commit indecent exposure or assault with the intent to commit rape. We disagree.

"We often address claims of insufficient evidence, and the standard of review is settled. 'A reviewing court faced with such a claim determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citations.]" (*People v. Moon* (2005) 37 Cal.4th 1, 22.) Before we

may set aside a judgment for insufficiency of evidence, it must clearly appear that there is no hypothesis under which we could find sufficient evidence. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.)

"In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141, disapproved of other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young*, at p. 1181.)

First degree residential burglary requires an unlawful entry into a dwelling with the intent to commit a felony within the home. (See Pen. Code, §§ 459, 460, subd. (a).) Pursuant to Judicial Council of California Criminal Jury Instructions No. 1700, the jury here was instructed that the crime of burglary occurs when a defendant enters a building with the intent to commit "rape or indecent exposure."[6] The jury was also instructed that

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[6] The jury was also instructed on the elements of indecent exposure and rape.

"[t]he defendant does not need to have actually committed rape, as long as he entered with the intent to do so. The People do not have to prove that the defendant actually committed rape or indecent exposure. [¶ . . . [¶] You may not find the defendant guilty of burglary unless you all agree that he intended to commit those crimes at the time of the entry." (*Ibid*.)

"Although the People must show that a defendant charged with burglary entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable." (*People v. Matson* (1974) 13 Cal.3d 35, 41, criticized on another point in *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447-448.) Here, the trier of fact reasonably could infer that defendant, when he entered Jane's residence, intended to expose himself, by the evidence that he actually did so, or that he intended to sexually assault Jane. Jane testified that defendant repeatedly made sexual comments to her prior to this incident. She further stated that defendant, who had never been to her apartment before, entered uninvited while she was asleep on the couch. She also said that she was startled awake by defendant touching her and that defendant refused to leave her apartment even after she asked him to do so several times. Jane further testified that after defendant exited the bathroom with his penis exposed, he grabbed Jane, held her, and rubbed his penis against her abdomen while asking her to see her breasts. Moreover, defendant admitted to Detective Topete that he had entered Jane's apartment while she was asleep. He also

admitted that he had exposed his penis to Jane hoping she would show him her breasts. Defendant further admitted to hugging Jane.

Defendant's arguments to the contrary were credibility issues for the jury to resolve. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Substantial evidence supports the jury's finding that defendant had the requisite specific intent to indecently expose himself or sexually assault Jane when he entered Jane's residence.

C. *Denial of Probation*

Finally, defendant argues that the trial court abused its discretion in denying him probation, because this was an "unusual case . . . ." In the alternative, he claims the court should have sentenced him to the low term rather than the middle term.

The trial court is required to determine whether a defendant is eligible for probation. (Cal. Rules of Court, rule 4.413(a).)[7] All defendants are eligible for probation as long as they do not fall within one of the categories restricting the availability of probation. The most severe restrictions deprive the sentencing court of jurisdiction to grant probation to the defendant; in other words, probation is unconditionally prohibited in certain felony cases. (See, e.g., Pen. Code, §§ 1203.06-1203.09.) Less severe restrictions merely limit the sentencing court's authority to grant probation except in unusual cases in which the interests of justice would best be served by such a grant. (See, e.g., Pen. Code, § 1203, subd. (e).)

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[7] All rule references are to the California Rules of Court.

Penal Code section 1203, subdivision (e) prohibits a grant of probation to defendants who have been convicted under certain circumstances "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation." One such circumstance is when a defendant has "been previously convicted twice in this state of a felony." (*Id*., subd. (e)(4).) Here, under Penal Code section 1203, subdivision (e)(4), defendant was presumptively ineligible for probation.

When a defendant is presumptively ineligible for probation, the trial court is required to use the criteria set forth in rule 4.413 to determine whether the presumption is overcome and the interests of justice would be served by a grant of probation. (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 830.)

Rule 4.413(c) lists factors for the court to consider in evaluating whether the statutory limitation on probation is overcome: "The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate. [¶] (1) . . . [¶] (A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and [¶] (B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense. [¶] (2) Facts limiting defendant's culpability [¶] A fact or circumstance not amounting to a defense, but reducing the defendant's

culpability for the offense, including: [¶] (A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence; [¶] (B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and [¶] (C) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

Defendant contends the trial court should have found this was an unusual case in which the interests of justice would be served by a grant of probation because of his young age, his lack of a significant criminal record, his lack of violence, and his good character.

An abuse of discretion standard of review applies. (*People v. Superior Court* (*Du*), *supra,* 5 Cal.App.4th at p. 831.) To establish abuse, the defendant must show that, under the circumstances, the sentencing decision was arbitrary, capricious, or "'exceed[ed] the bounds of reason . . . .'" (*People v. Warner* (1978) 20 Cal.3d 678, 683; see also *People v. Cazares* (1987) 190 Cal.App.3d 833, 837 [defendant has the burden "to clearly show that the sentencing decision was irrational or arbitrary"].)

We acknowledge defendant was 27 years old at the time of the offenses and that his offenses did not escalate to violence. However, these factors -- youth and lack of violence -- are insufficient in this case to overturn the trial court's finding that this was not an unusual case.

Defendant's criminal record indicates that he has a history of incidents involving indecent exposure. This pattern began when he was a teenager and escalated to the point where he entered the victim's residence to commit the offense. Despite his relatively young age, defendant's criminal record includes misdemeanor convictions for indecent exposure, dissuading a witness, driving on a suspended license, and annoying or molesting a child; two felony convictions for indecent exposure; and a felony conviction for failing to register as a sex offender. In addition, it appears defendant has another pending case from a June 2007 incident in which he was charged with felony indecent exposure, felony battery, and felony false imprisonment. Moreover, defendant's psychological testing showed that he was at a high risk for sexual offense recidivism. "[I]f the statutory limitations on probation are to have any substantial scope and effect, 'unusual cases' and 'interests of justice' must be narrowly construed and, as rule [4.413] provides, limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced." (*People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1229 [Fourth Dist., Div. Two].) The trial court here properly exercised its discretion in finding the presumption against probation eligibility should not be overridden.

We further conclude that the trial court properly denied defendant probation. The decision whether to grant or deny probation is reviewed under the abuse of discretion standard. (*People v. Superior Court* (*Du*), *supra*, 5 Cal.App.4th at p. 831; see also Pen Code, § 1203, subd. (b)(3).) "Probation is an act of clemency which rests within the

discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion." (*People v. Henderson* (1964) 226 Cal.App.2d 160, 163.)

In granting or denying probation, the trial court must consider statutory guidelines, including the safety of the public, the nature of the offense, the interests of justice (punishment, reintegration of the offender into the community, enforcement of the probation conditions), the loss to the victim, and the needs of the defendant. (Pen. Code, § 1202.7.) The California Rules of Court also provide criteria for the court to consider in deciding whether to grant or deny probation. (See rule 4.414.)

Here, we cannot find the denial of probation was an abuse of discretion. The trial court read and considered the probation report, defendant's sentencing memorandum and the character letters in support of probation and heard from counsel during the sentencing hearing. It is clear the court considered the merits of defendant's application for probation but denied probation due to defendant's repeat offenses for indecent exposure and his danger to society.

Defendant appears to suggest that the trial court failed to consider or gave insufficient weight to the mitigating factors. He also claims that the court did not exercise "its independent discretion on whether to grant probation." The record belies this contention. The court impliedly found that the factors against probation outweighed the factors in favor of probation. That finding is not arbitrary, capricious, or an abuse of discretion. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.) "An order

denying probation will not be reversed in the absence of a clear abuse of discretion. [Citation.] In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. [Citations.]" (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896.)

In the alternative, defendant contends that he should have received a mitigated sentence or the low term rather than the middle term.[8] Our review of the trial court's determination of the appropriate prison term requires that we apply the same broad discretionary standard as when reviewing the trial court's decision to deny defendant probation. (See *U.S. v. Booker* (2005) 543 U.S. 220, 233 [125 S.Ct. 738, 160 L.Ed.2d 621]; *People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) "One factor alone may warrant imposition of the upper term [citation] and the trial court need not state reasons for minimizing or disregarding circumstances in mitigation [citation]." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; see also *People v. Osband* (1996) 13 Cal.4th 622, 730.)

The record reflects that the trial court considered and impliedly weighed the competing factors and concluded that defendant's record justified the middle term. As

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[8] Without *any* substantive legal analysis or citation of legal authority, defendant also summarily asserts that he is not responsible for the victim restitution fine. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, overruled on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) "Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

factors in aggravation, the probation officer noted that defendant's prior convictions were numerous and of increasing seriousness and that the victim was particularly vulnerable. As a factor in mitigation, the probation officer pointed out that this would be defendant's first prison commitment. The factors in aggravation noted by the probation officer warranted the imposition of the middle term. The court was cognizant of all the relevant circumstances surrounding this case, including the aggravating and mitigating factors, and appropriately used those circumstances in determining an appropriate sentence. We conclude the trial court's decision to be reasonable; especially in light of the broad discretion afforded to sentencing courts.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

KING
J.